

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 27, 2007 Session

AEROSTRUCTURES CORPORATION v. HARRY P. YORK

**Direct Appeal from the Chancery Court for Davidson County
No. 03-1587-I Claudia C. Bonnyman, Chancellor**

**No. M2006-01362-WC-R3-WC - Mailed - December 18, 2007
Filed - January 18, 2008**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. On appeal, the employee, Harry P. York, contends that the trial court erred in holding that he had a 13%, rather than a 30%, impairment rating to the body as a whole. Because the evidence does not preponderate against this finding, we affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Affirmed

DONALD P. HARRIS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and ALLEN W. WALLACE, SR. J., joined.

D. Russell Thomas, Murfreesboro, Tennessee, for the appellant, Harry P. York.

Aaron S. Guin, Nashville, Tennessee, for the appellee, Aerostructures Corporation.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Harry P. York was 53 years old and divorced at the time of trial. He is a high school graduate with no further education. He began working for Aerostructures Corporation¹ (Aerostructures) in 1983. While with Aerostructures, Mr. York worked as a fabricator, a production layout developer,

¹During the course of this litigation, Vought Aircraft Industries, Incorporated purchased Aerostructures Corporation.

and a bench machinist. Although the physical demands placed on Mr. York differed with these positions, lifting, bending, and twisting, to some degree, were required in each.

In January of 1999, Mr. York visited the office of Dr. B. Paul Turpin, Mr. York's primary care physician, with complaints of low back discomfort and right leg pain. At the request of Dr. Turpin, Mr. York had an MRI of his lumbar spine on January 26, 1999. Following the MRI, Mr. York was referred to Dr. Ronald T. Zellum, a neurosurgeon. Dr. Zellum diagnosed Mr. York as having congenital spinal stenosis, degenerative disk disease, a paracentral disc protrusion at L1-2, and diffuse disc bulges at L2-3, L4-5, and L5-S1. Mr. York was treated with physical therapy and medication. After this diagnosis, except in times of layoff, Mr. York continued to work for Aerostructures without restrictions.

On December 7, 2001, Mr. York was working as a bench machinist. As part of his job, he was responsible for maintaining the cleanliness of his work station for the purposes of assuring work accuracy. Near the end of his shift on that Friday afternoon, Mr. York began cleaning up his workstation and assisting others with their workstations. Realizing that one of his fellow employees had failed to empty a trash can, Mr. York took it upon himself to do so. He testified that the trash can, full of metal scraps, rags soaked with solvents, and other work materials weighed between 150-200 pounds. While lifting the trash can to dump its contents into a dumpster, Mr. York heard a "pop" in his back. He testified that his back "just gave way," and he had numbness in his left leg.

The following Monday, Mr. York reported the injury to Aerostructures and was seen by Aerostructures's on site doctor, Dr. Tippens. Following Dr. Tippens examination, Aerostructures provided Mr. York with a panel of doctors from which to choose for the care and treatment of his back injury. Mr. York chose Dr. Zandra R. Petway, a primary care physician.

Mr. York saw Dr. Petway five times in December and January. Dr. Petway diagnosed Mr. York as having lumber strain with radiculopathy (numbness) in the left leg. Mr. York was initially placed on restrictions but was returned to full duty in mid-December. An MRI was taken in early January. It revealed that Mr. York had: (1) a "central posterior disc herniation with apparent extruded disc material superiorly, posterior to the L1 vertebral body" at L1-2; (2) a "right paracentral and posterior central disc herniation" at L2-3; (3) diffuse bulges at L3-4 and L4-5; and (3) a "posterior central broad-based disc protrusion in conjunction with congenital findings" at L5-S1.

Following the MRI, Dr. Petway referred Mr. York to an orthopedic surgeon, Dr. Robert M. Dimick. Mr. York saw Dr. Dimick on January 21, 2002. After taking Mr. York's history, conducting a physical examination, and reviewing the January 2002 MRI report and Mr. York's previous medical records, Dr. Dimick determined that Mr. York "may continue full work activity" but encouraged Mr. York "to search for other forms of employment which would not involve his lumber spine in stressful situations." Dr. Dimick noted that most of Mr. York's pain has subsided but he has a severely degenerated spine. As such, Dr. Dimick concluded that, although the current numbness in Mr. York's left leg should subside with time, "it is likely that [Mr. York's] degeneration

will continue and he will probably experience symptoms in the future based on this degeneration.” Dr. Dimick suggested that Mr. York be re-evaluated in one year.

In April 2002, Mr. York visited Dr. David W. Gaw, another orthopedic surgeon, for a independent medical evaluation. At that time, Dr. Gaw took a personal history of Mr. York, evaluated him, and prescribed pain medication and an exercise program. Dr. Gaw noted that he did not expect “the incident in December 2001 to cause any permanent impairment.”

Mr. York returned to Dr. Dimick’s office on October 24, 2002. At that time, Dr. Dimick compared the pre-work injury MRI (1999) to the post-work injury MRI (2002) and noted that the right paracentral herniation at L2-3 was not present in the pre-work injury MRI. As such, Dr. Dimick concluded that this “new” injury was most likely “the result of an aggravation of preexisting spinal conditions secondary to workplace events.” He further noted that Mr. York had reached maximum medical improvement, and because of the appearance of a new herniated disk in the upper spine with radiation to the left thigh, Mr. York qualified for a 12% impairment of the whole person.

On November 19, 2002, Mr. York saw yet another physician, Dr. Thomas J. O’Brien, at the request of Aerostructures. After a physical examination of Mr. York, a review of the records of Drs. Zellum and Dimick, and a review of the January 2002 MRI, Dr. O’Brien diagnosed Mr. York as having “an age related and congenital condition [which] is not related to his work activities at Aerostructures.” Dr. O’Brien believed that Mr. York had not sustained a permanent impairment and stated that Mr. York’s symptoms were the result of his severe spinal stenosis and the natural aging process.

Due to increased pain in his lower back and legs, Mr. York again saw Dr. Gaw for an independent medical “re-evaluation” in June 2003. During this visit, Dr. Gaw determined that Mr. York was at maximum medical improvement, and given Mr. York’s worsened condition, assigned him a 7% impairment of the whole person. Dr. Gaw testified that: (1) he was unsure what MRIs he reviewed in making this impairment rating; (2) he did not review the records of Dr. Turpin or Dr. Zellum; and (3) he did not discuss causation in the medical report. Dr. Gaw also stated that the MRI scan that he did review showed disk bulges, no herniation other than [at] L1-2. Following this visit, Mr. York continued to work for Aerostructures until he was laid off in October 2003.

Aerostructures filed this workers’ compensation action on June 4, 2003, requesting the court to determine the rights and liabilities of the parties pursuant to Mr. York’s December 7, 2001 injury. On January 5, 2004, Mr. York answered the complaint and filed a counter-complaint, arguing that he suffered an injury that arose out of and in the course and scope of his employment and, as such, was entitled to temporary total benefits, past medicals, future medicals, temporary partial disability, and future disability.

During the time this litigation was pending, while at home during the lay-off period in February 2004, Mr. York fell when his “legs gave way” after “all the sensation totally left [his] lower body.” Mr. York was taken by ambulance to the Southern Hills emergency room with complaints

of weakness in his legs and feet. He was admitted to the hospital and placed under the care of Dr. Neil Garrett Powell, a neurosurgeon. Dr. Powell ordered an MRI which showed a “congenitally narrow spinal canal and a herniated [disc] at L5-S1.” After reviewing the MRI, Dr. Powell and Mr. York discussed treatment options related to the weakness in Mr. York’s lower legs. Dr. Powell decided that a discectomy at L5-S1 with lumbar laminectomies at L3, L4, and L5 was the best course of action. During the surgery, an infection was discovered in the outside part of the spinal canal. Because of the infection, the discectomy at L5-S1 was not performed. Mr. York was discharged from the hospital on March 1.

Mr. York was called back to work on June 11, 2004. However, per Dr. Powell’s orders, Mr. York was off work for twelve weeks following the surgery. This was the first time that Mr. York missed work due to a back-related injury. Mr. York returned to work in August 2004.

On June 13, 2005, Mr. York returned to Dr. Gaw’s office with complaints of numbness in his legs and a lack of coordination in the use of his lower extremities. At this time, Dr. Gaw re-evaluated Mr. York and determined that he had a permanent partial impairment of 30% to the whole person. Dr. Gaw based his findings on the fact that Mr. York had sustained a multi-level back injury.

On July 18, 2005, Mr. York saw Dr. Powell for a post-operative check-up. Dr. Powell determined that Mr. York was at maximum medical improvement following his February 2004 surgery, and assigned a 13% permanent partial impairment to the body as a whole.

After reviewing the medical depositions and testimony of Mr. York, the trial court found that: (1) Mr. York suffered a work-related back injury on December 7, 2001; (2) this injury was probably a new disc herniation at L2-3; (3) from this injury, Mr. York has a medical impairment rating of 13% to the body as a whole; (4) Mr. York made a meaningful return to work both after the 2001 injury and the 2004 surgery and his vocational disability was set at the maximum of 2.5 times his impairment or 32.5% permanent partial disability to the body as a whole; and (5) as an alternate holding, if Mr. York did not make a meaningful return to work, his vocational impairment rating was 50% to the body. In making these determinations, the trial court relied on the records and testimony of Drs. Zelle, Dimick, and Powell. The trial court rejected the findings of Dr. Gaw, stating that he “could not support his opinions in this case.”

Mr. York appealed to this Court, arguing that the trial court erred in relying on Dr. Powell’s impairment rating of 13% instead of Dr. Gaw’s impairment rating of 30%. Mr. York argued that the trial court should have adopted Dr. Gaw’s impairment rating because Mr. York suffered a multi-level injury. Mr. York also challenged the trial court’s alternate holding that if Mr. York did not make a meaningful return to work, his vocational impairment rating was 50% to the body. Mr. York argues that the trial court erred in ruling on this issue because Mr. York was still employed with Aerostructures and had not challenged that he had made a meaningful return to work. Thus, Mr. York contends that this issue was not ripe for adjudication.

II. STANDARD OF REVIEW

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2005). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997). With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.

III. ANALYSIS

In this appeal, Mr. York asks us to find that Dr. Gaw's impairment rating more accurately reflects Mr. York's current medical condition. Mr. York argues that because he suffered a multi-level, work-related injury, Dr. Gaw's impairment rating, based upon a multi-level injury, more accurately reflects his present condition.

When testimony differs as to the extent of an employee's work-related injury, it is within the discretion of the trial court to conclude that the opinion of one expert should be accepted over that of other experts. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). In so doing, the trial court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991).

The trial court found that "Dr. Gaw could not support his opinions in this case." Although the trial court did not specifically state why Dr. Gaw could not support his opinions, the record indicates that Dr. Gaw was unable to specify which medical records and diagnostic tests he reviewed and relied upon in arriving at his opinions. The American Medical Association, Guides to the Evaluation of Permanent Impairment, Fifth Edition, ("AMA Guides") state that in assessing a patient, "the evaluation should include a comprehensive, accurate medical history; a review of all pertinent records; a comprehensive description of the individual's current symptoms and their relationship to daily activities; a careful and thorough physical examination; and all findings of relevant laboratory, radiologic, electrodiagnostic, and ancillary tests." Id. at 374. The AMA Guides further require the physician to "[I]st diagnostic study results and outstanding pertinent diagnostic studies." Id. at 21.

During his deposition, Dr. Gaw was repeatedly questioned about his examinations of Mr. York and the medical reports that were available to him at the time of those examinations. When asked about the history that was provided to him by Mr. York during these examinations, Dr. Gaw agreed that it was inaccurate. Dr. Gaw was questioned about what medical records and MRI results he reviewed in determining treatment plans and assigning impairment ratings. He was unable to specifically state what physician's records and what MRIs reports he had reviewed. He was further unable to testify whether he reviewed the records and reports prior to giving an impairment rating or solely in preparation for his deposition. Dr. Gaw also failed to mention or assess causation in any of his medical reports. The trial court certainly could have found Dr. Gaw failed to establish that his assessment of Mr. York's condition complied with the requirements of the AMA Guides, as outlined above. Thus, our review of the record indicates the trial court's determination that Dr. Gaw was unable to support his opinions was justified.

Dr. Powell's physical examinations and coinciding medical reports did, however, specifically address the criteria listed in the AMA Guides. Through his deposition, Dr. Powell stated that he had reviewed the 1999 MRI and the January 2002 MRI and concluded that there was a "worsening between 1999 and January of 2002." Further he stated that the causation of this "worsening" was the work-related injury that occurred in December 2001. Dr. Powell, unlike Dr. Gaw, was given an accurate history of the injury from Mr. York, which also allowed for a better understanding of causation. We conclude that Dr. Powell's impairment rating more accurately reflects the "purposes, applications, and methods for performing and reporting impairment evaluations." AMA Guides, at 374.

We note additionally that Dr. Gaw's determining Mr. York's impairment based upon a multi-level, work-related back injury on December 7, 2001, was not supported by the record. Although Mr. York had a multi-level disc surgery, the record fails to establish that Mr. York's surgery was the result of a multi-level disc injury. After comparing the pre-injury MRI to the post-injury MRI, Dr. Dimick noted that the right paracentral herniation at L2-3 was not present in the pre-work injury MRI. It was the herniation at L2-3, observed for the first time on the January 2002 MRI, that the trial court found to be the work-related injury. The disk herniation at L5-S1, which was the basis for the determination that the multi-level surgery was necessary, was not seen until the 2004 MRI, more than two years after the work-related injury had occurred. For this additional reason, we also conclude that Dr. Powell's impairment rating more accurately reflects the medical impairment that was caused by Mr. York's December 7, 2001 injury.

Mr. York has also challenged the trial court's alternate finding that, if Mr. York did not make a meaningful return to work, he has a 50% vocational disability. We agree with Mr. York that, because neither Mr. York nor Aerostructures challenged that Mr. York made a meaningful return to work, the trial court was not required to make any factual finding concerning this issue. Thus, the trial court's alternate finding need not be reviewed by this court, but may be considered mere surplusage. See McRedmond v. Estate of Marianelli, 46 S.W.3d 730, 738 (Tenn. Ct. App. 2000). We would note, however, that the practice of making alternative findings has been encouraged by

this Panel in previous cases. See Durant v. Saturn Corp., No. M2003-00566-SC-WCM-CV, 2004 WL 941012, at *8 (Tenn. Workers' Comp. Panel, Apr. 30, 2004).

IV. CONCLUSION

For the reasons stated above, we agree with the trial court that the evidence preponderates in favor of the expert medical testimony of Dr. Powell. Therefore, we affirm the trial court's finding of a 13% impairment rating to the body as a whole and its award of 32.5% permanent partial disability to the body as a whole. Costs of this appeal are taxed to Harry P. York, and his surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

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SPECIAL WORKERS' COMPENSATION APPEALS PANEL

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**Chancery Court for Davidson County
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No. M2006-01362-WC-R3-WC - Filed - January 18, 2008

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Harry P. York, and his surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM